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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-156

CECIL HICKS, District Attorney of the County of Orange, State of California; ORETTA SEARS, Deputy District Attorney of the County of Orange, State of California; DUDLEY D. GOURLEY, Chief of Police of the City of Buena Park, County of Orange, State of California; ARTHUR FONTECCHIO, RICHARD HAFDAHL and DANIEL HARRISON, Officers of the Police Department of the City of Buena Park, County of Orange, State of California,

Appellants,

vs.

VINCENT MIRANDA, doing business as WALNUT PROPERTIES; and PUSSYCAT THEATRE HOLLYWOOD, a California corporation,

Appellees.

On Appeal From the United States District Court for the Central District of California.

APPELLANTS' OPENING BRIEF.

Opinions Below.

The Opinion of the three-judge court issued on June 4, 1974, is set forth as Appendix A to the jurisdictional statement. The Supplemental Opinion of the three-judge court issued on September 30, 1974, is set forth at pages 121 and f. of Appendix.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1253 in that this is a case within the purview of that statute for the following reasons:

On November 29, 1973, Appellee Vincent Miranda, doing business as Walnut Properties and Pussycat Theatre Hollywood, a California corporation, filed a "Complaint for Damages, Declaratory Relief and Injunction" pursuant to 28 U.S.C. 1343(3) and (4), 42 U.S.C. 1983, 28 U.S.C. 2201 and 2202, and 28 U.S.C. 2281 and 2284. Appellants were notified of the pending action although they were not served with the summons and complaint until January 14, 1974.

On December 28, 1973, the Honorable Lawrence T. Lydick, District Judge, to whom the case was originally assigned, issued an order denying Appellee's request for a temporary restraining order and for return of the films seized but concluded that;

> The substantive question of whether or not the challenged State statutes are unconstitutional and enforcement thereof should accordingly be restrained, and ancillary questions with respect thereto including the appropriateness of abstention, may be heard and determined only by a district court of three judges under 28 U.S.C. section 2281. Having determined that the constitutional question raised is not wholly insubstantial and is not, legally speaking, non-existent, that the complaint at least formally alleges a basis for equitable relief and that the case presented otherwise comes within the requirements of the three-judge statute even though the prayer seeks declaratory judgment only as to the constitutionality question, notification

> and certification in accordance with 28 U.S.C. sections 2281 and 2284 will issue from this Court seeking appointment of a statutory three-judge court to hear and determine the cause.

The three-judge court which was convened pursuant to the above certification by its opinion and judgment entered on June 4, 1974 (Jurisd. Stat. A1-A18), held the California Obscenity Statutes to be unconstitutional and although it specifically did not enjoin pending state prosecution, it ordered the return of all evidence seized, further declaring that:

> The court retains full and complete jurisdiction over the parties and the causes of action for all purposes (Jurisd. Stat. A, p. 18).

On August 3, 1974, Judge Ferguson, a member of the three-judge panel, issued a temporary restraining order against further seizures pursuant to the above-retained jurisdiction and ordered Appellants to show cause why they should not be found in contempt for not having returned the seized copies. He further ordered them to show cause why further seizures and prosecutions should not be enjoined both as to "Deep Throat" and as to a new movie, "Devil in Miss Jones," and why all copies seized pursuant to search warrants issued after adversary hearing, on July 29, 30 and 31, 1974, should not be ordered returned. On August 12, 1974, an injunction against further seizures was issued. These orders show that although the Court did not "enjoin" operation of the state laws on paper, it acts in an injunctive manner in enforcing its "declaration."

Notice of Appeal was filed in that court on July 5, 1974.

The record on appeal duly certified to this Honorable Court on August 22, 1974, shows that Appellants made the following post-trial motions:

On July 14, 1974, Appellants Gourley, Fontecchio, Hafdahl and Harrison filed a document entitled *Notice of Motion for Rehearing and for Relief from Judgment and to Amend and Alter Judgment and to Correct Errors in Judgment and to Stay Judgment Pending Determination of that Motion.* This document (A. p. 91, R. pp. 531-532) consists of two pages and notifies the parties that *a motion will be made on July 1, 1974.* Appellants Cecil Hicks and Oretta D. Sears, also on June 14, 1974, filed notice *that on July 1, 1974,* Appellants, *pursuant to Rule 60(b)(1),* would move *for Relief from Judgment, for Rehearing and for Stay of Judgment Pending Determination of this Motion.*

The Points and Authorities filed in support of Appellant's notices of motions clearly show that Appellants only sought to have the Court reconsider its legal position and vacate the judgment on jurisdictional grounds. The original three-judge Court made a finding of fact that there were related state prosecutions pending in the state Courts and concluded that as a matter of law the existence of related prosecutions of the theater employees did not affect the Federal Plaintiffs' rights to declaratory relief. The Points and Authorities reiterate the existence of state prosecutions and ask the three-judge Court to reconsider its position as to its jurisdiction.

The Points and Authorities further pointed out that officers acting under authority of valid search warrants cannot be said to be in "bad faith." This argument was again one challenging a legal conclusion of the Court.

Finally, the impropriety of the order to return was reiterated. The requested relief was *specifically* designated to be under Rule 60(b)(1) of the Federal Rules of Criminal Procedure (A. p. 91, R. p. 533-A).

On September 30, 1974, in spite of the fact that the Points and Authorities show the intent to file a motion under Rule 60, because the *notice* of motion filed by some of Appellants *also* referred generally to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure, and because the *notice of motion* was coincidentally filed the *tenth* day after entry of judgment, the three-judge Court apparently elected to treat the "motions" as having been timely made under Rule 52 of the Federal Rules of Civil Procedure and entered its alleged supplemental opinion purporting to amend the judgment in such a way as to require Appellants to either nullify the Appellate jurisdiction of this Honorable Court or to once more be subjected to Federal contempt proceedings.

The supplemental opinion, in fact, makes no material changes to its prior order. It merely reiterates its prior findings that the California obscenity laws are unconstitutional and purports to amend the second part of the judgment by substituting the following order to the priorly made order to return the films:

> At the January 29th proceeding in the Municipal Court, the assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated."

The money was thereupon returned.

It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.

Paragraph *two* of the judgment of this court will be amended to read as follows:

2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973 in the City of Buena Park.

Except as the judgment will be so modified, the motions of the defendants are denied (A. pp. 121 and f.).

Questions Presented.

1. Whether the *Miller v. California* decision issued by this Honorable Court on July 25, 1974, dismissing "for want of a substantial federal question" an appeal from a post-*Miller* conviction under the California Obscenity Statutes is a decision on the merits as to the constitutionality of the California Obscenity Statutes which is binding on lower Federal courts.

2. Whether the Federal District Court erred when it refused to abstain from adjudicating constitutional validity of the California Obscenity Statutes where state prosecutions were pending against representative agents of the Appellees.

3. Whether the Federal District Court erred when it refused to abstain from adjudicating constitutional

validity of the California Obscenity Statutes where state criminal prosecutions against Appellees had been filed eight days after the three-judge court had been constituted and were pending at the time the court issued its declaratory judgment.

4. Whether the doctrine of equitable abstention is applicable where federal action would have a disruptive effect upon a state's criminal processes and has the effect of encouraging disobedience of validly issued orders of a state court and the further effect of encouraging defendants in state proceedings to refuse to litigate in state courts.

5. Whether the Federal court can properly order Appellants to return items seized under order of validly issued search warrants and which are entered as evidence in cases presently pending in the state courts and which are under the physical *or* constructive custody of the state court.

6. Whether the three-judge court abused its power in making a finding that Appellants had harassed the Appellees without allowing for an evidentiary hearing, ordering the matters submitted on affidavits and determining the factual issue in a manner contrary to the determination of the one judge who under the statute should have been a member of the panel.

7. Whether the court erred in determining that searches conducted under authority of duly issued search warrants constituted harassment as a matter of law.

8. Whether failure to follow the procedures mandated by 28 U.S.C. 2284 vitiates and voids the injunctive orders of the court.

Statutes Involved.

California Penal Code Sections 311, 311.2, *et seq.* and California Penal Code Sections 1526, 1536, 1539, and 1540 are set forth as Appendices to the jurisdictional statement.

Statement of the Case.

On November 23, 1973, the Honorable John H. Smith, Jr., Judge of the Municipal Court, Central Orange County Judicial District, along with several officers from the Buena Park Police Department, viewed a film entitled "Deep Throat" at the Pussycat Theatre owned by Appellees in Buena Park, California. Based on his viewing of the film, Judge Smith felt there was probable cause for believing the film to be obscene and issued a search warrant for the seizure of the film (A p. 36, R. p. 221).

That same day, November 23, 1973, at about 4:30 p.m., Buena Park police officers made a seizure of another copy of "Deep Throat" which was again being shown at Appellees' theater. The seizure was made pursuant to a second search warrant signed by Judge Smith. The affidavit of said warrant stated that the second copy of the film in fact differed from that seen by Judge Smith as there were additional scenes of sexual activities not present in the first film (A. p. 40, R. pp. 223-227).

Later that day a third seizure of a copy of the film "Deep Throat" was made, based on a third search warrant signed by Judge Smith, who had personally returned to the theater again to view the film. During this viewing, Buena Park Police Officer Fontecchio sat with the judge and pointed out differences between the copy being viewed and the previously seized copies.

Judge Smith ordered Officer Fontecchio to seize the third copy of the film and further ordered the officers to seize all monies present in the theater, including money in the theater safe. Pursuant to the judge's order, the officers called in a licensed locksmith who opened the floor safe of the theater, from which some $4,000 was seized (A. p. 40, R. pp. 223-227).

On Saturday, November 24, 1973, the Buena Park police officers deposited with Judge Smith all items which had been seized pursuant to the three warrants (A. p. 41, R. p. 222). Also on that date they observed a fourth copy of the film "Deep Throat" which was being shown at Appellees' theater. The officers saw the film and noted that this fourth film was different from the seized copies. They reported the differences to Judge Smith who issued a search warrant and a fourth seizure of the film took place (A. p. 41, R. pp. 223-227).

On Monday, November 26, 1973, in the Orange County Superior Court, the People of the State of California applied for and were granted a temporary restraining order and order to show cause in respect to a determination of obscenity of the movie "Deep Throat" (A. p. 64, R. pp. 17-18). In its order to show cause, the Superior Court of Orange County ordered Petitioners to appear and show cause five days later why all copies of the film "Deep Throat" in their possession in Orange County should not be ordered seized as being obscene. The order further provided that the hearing on the issue of obscenity could be had at the request of Petitioners at any time prior to the date scheduled, provided the court was free and the District Attorney was given one hour's notice (A. p. 65, R. pp. 17-18). At Petitioner's request, at 2:30 p.m. on

that same day a hearing was had in Department 21 of the Orange County Superior Court, before the Honorable Byron K. McMillan, the judge who had issued the order to show cause and temporary restraining order (A. p. 22, R. pp. 12-16).

Attorney David M. Brown appeared at said hearing on behalf of Petitioners. He argued lack of jurisdiction of the Orange County Superior Court to hold such a hearing (A. p. 68, R. p. 283). He filed with the Orange County Superior Court a short document entitled "Reservation of Federal Constitutional Question" in which he stated, "Defendants . . . reserve all federal constitutional claims for purposes of federal jurisdiction." (A. p. 75, R. p. 26). Judge McMillan of the Orange County Superior Court ruled that jurisdiction was present, at which time Mr. Brown refused to submit to the jurisdiction of the state court (A. p. 72, R. p. 310). The matter was recessed until the following morning at 9:00 a.m. for the taking of evidence and Mr. Brown was advised that if Petitioners made no appearance, the hearing would be held in their absence.

On Tuesday, November 27, 1973, in open court, testimony was heard from witnesses, including an expert witness, and the court viewed the film. Based on the evidence the court ruled that the film "Deep Throat" was obscene beyond any reasonable doubt and issued an "order of seizure after adversary hearing" directing officers to seize any copies of "Deep Throat" currently at the Buena Park Pussycat Theatre or which were to be found there in the future, and to bring same before the court (A. p. 74, R. pp. 324-325). This order was served upon the theater that very day, though no seizure was made as no copies of the film were present.

Also on *November 26, 1973*, a criminal complaint was filed against the agents of Petitioner Miranda who were managing the theater and showing the films (A. p. 67, R. p. 285). The prosecution was continued several times and over objection of Appellants allegedly to allow for a final determination of the federal proceedings (R. pp. 542-548).

On November 29, 1973, Petitioner Miranda filed a federal complaint for damages, declaratory relief and injunction (A. p. 7, R. p. 7). The case was assigned to Judge Warren Ferguson of the United States District Court, Central California District who disqualified himself (A. p. 20, R. p. 11). The case was thereafter transferred to Judge Lydick of that same court.

On December 28, 1974, an order denying a temporary restraining order was issued by Judge Lydick of the Federal District Court. The order reflects Judge Lydick's finding that the record was totally devoid of any showing of wrongdoing by Appellants:

> The record before us shows that on November 23 and 24, 1973, law enforcement officers, executing validly issued search warrants on four separate occasions, seized prints of the film "Deep Throat" as well as display posters and cash receipts in connection with alleged separate violations by plaintiff corporation and others of California Penal Code sections 311, 311.2 and 311.5, popularly known as the California Obscenity Statute.
>
> Thereafter on November 26, 1973, defendant Hicks as District Attorney for the County of Orange applied to and obtained from the Superior Court of the State of California an order to show cause addressed to plaintiffs and others as to why all copies of the film should not be declared ob-

scene and plaintiffs and other respondents permanently enjoined from further exhibition of it. Adversary hearing on the order to show cause was noticed for and held on November 27 and 28, 1973, at which these plaintiffs and others appeared by counsel. The Superior Court, after viewing the film and taking other evidence, declared it obscene and ordered all copies found in plaintiff's corporation's theatre seized. This action was filed in this Court the next day, attacking on procedural as well as substantive grounds the actions of defendants and the State courts.

In our view plaintiffs have failed totally to make that showing of irreparable damage, lack of an adequate legal remedy and likelihood of prevailing on the merits needed to justify the issuance of a temporary restraining order which would require police officers, elected public officials and officers of the California courts to disobey the orders of those courts and would restrain the lawful enforcement of a State statute. The seizures complained of were made pursuant to warrants issued after a determination of probable cause by a neutral magistrate, and following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding was made available and utilized. Procedurally, therefore, the seizure was constitutionally permissible and no return of the film or other material is required (A. p. 57, R. pp. 182-185).

On January 8, 1974, an order designating the Honorable Ely, Ferguson and East as the three-judge court to hear the case was entered by Judge Chambers, Chief Judge for the Ninth Circuit (A. pp. 84-85) (The

order was forwarded to Appellants *on February 8, 1974*) (A. pp. 82-83, R. pp. 341-342).

On January 8, 1974, Mr. Bayley, the manager of the theater, filed a motion to suppress as illegally seized the four copies of "Deep Throat" in the North Orange County Municipal Court (A. p. 80, R. pp. 365-367). On that same date an amended complaint including the theater owner Mr. Miranda was signed and prepared. The Municipal Court record reflects that the amended complaint, though officially filed on January 15, 1974, had been prepared and signed on January 8, 1974 (A. p. 92, R. p. 574). Mr. Miranda and the theatre joined in the motion to suppress scheduled for hearing in the Municipal Court at that time (A. p. 76, R. pp. 365-367).

On January 14, 1974, the complaint filed in the Federal Court was officially served on appellants.

On January 29, 1974, Cecil Hicks and Oretta Sears filed their answer supported by certified documents and notarized declarations signed under penalty of perjury (essentially the same documents and affidavits presented to Judge Lydick in opposition to the temporary restraining order) (*Cf.* R. pp. 57-136 with R. pp. 215-334).

On January 29, 1974, the Orange County Municipal Court granted the motion to suppress as to two of the copies of "Deep Throat." It denied the motion as to the other two copies (A. p. 80).

On February 15, 1974, Appellants filed notice of appeal from the Orange County Municipal Court's order of suppression (A. p. 87, R. pp. 404-405).

On March 20, 1974, a memorandum was issued by Judge Ferguson on behalf of the three-judge court

ordering the issue of "harassment" submitted on affidavits and requesting additional points and authorities on the issue of constitutionality of the state statutes (A. p. 89, R. pp. 427-428). Neither Mr. Miranda nor Cecil Hicks and Oretta Sears submitted additional affidavits so that the three-judge court had before it only the original affidavits presented to Judge Lydick.

On June 4, 1974, the three-judge court issued its memorandum opinion totally ignoring Judge Lydick's findings, totally ignoring the existence of the adversary hearing in the state court, totally ignoring the criminal proceedings pending in the state court, totally ignoring the fact that one of defendants, Deputy District Attorney Sears, was improperly named since her sole involvement was the *preparation* of the state court order to show cause regarding the adversary hearing, and concluding that (a) California Penal Code Sections 311, *et seq.*, are unconstitutional, (b) that *People v. Enskat*, 33 Cal.App.3d 900, improperly interprets prior California decisions by the use of "specious arguments," (c) that the "*objective*" facts set forth in the first part of the opinion clearly demonstrate "bad faith and harassment" and (d) that requiring the state to return *all* copies of the film "might have" some disruptive influence on a possible future prosecution—*or upon prosecutions of others*—but (e) since the state statute has been declared unconstitutional the property is no longer evidence and/or contraband and "it can and is ordered returned." (Jurisd. Statement A, pp. 1-21).

A *notice* that a motion for relief from judgment to amend and alter judgment and to correct errors in the judgment pursuant to Federal Rules of Civil Procedure, Rules 59(a) and (d), 60(a) and (b) and 62 would be made *on July 1* was filed in the Federal action by

Gourley, Fontecchio, Hafdahl and Harrison on June 14, 1974 (A. p. 90, R. p. 531). Petitions for Rehearing under Rule 60(b) of the Federal Rules of Civil Procedure were filed by Hicks and Sears (A. p. 91, R. p. 533A).

The theater resumed the showing of "Deep Throat" and added "Devil in Miss Jones" as a second feature. No arrests or seizures were made while Appellants attempted to determine the "scope" of the Federal declaratory judgment order.

On July 25, 1974, however, the United States Supreme Court issued its opinion in *Miller v. California,* 41 L.Ed.2d 1158, dismissing the appeal for want of a substantial federal question.

On July 26, 1974, the Appellate Department of the Orange County Superior Court reaffirmed the validity of all the seizures in this criminal action and acknowledged that a valid adversary hearing on the issue of obscenity had been had (A. p. 131).

On Monday, July 29, 1974, Deputy District Attorney Sears informed the Orange County Superior Court that "Deep Throat" was still being shown and asked whether the court wished to issue a warrant for its seizure. An adversary hearing having been had on November 26 and 27, 1973, the court issued the search warrant and several seizures occurred between Monday, July 29 and Friday, August 2, 1974, each on a separate warrant and each being the source of a new prosecution against the theater, the employees, etc. (A. pp. 106-112). Those prosecutions are presently pending.

In addition, on July 30, 1974, the state judge, upon affidavit of a police officer, issued a search warrant for the seizure of the film "Devil in Miss Jones"

which was being shown at the same theater in conjunction with "Deep Throat." (A. pp. 108-109). On July 31, 1974, a second search warrant was issued and a second copy seized (A. p. 110). This search warrant was issued in conjunction with an order to show cause requesting defendants to appear on Friday, August 2, 1974, at 2:00 p.m., or at any earlier time at defendants' request, and show cause why all copies in the possession of the theater should not be seized. The warrant further provided that if defendants had no additional copies available for showing, the second copy would be returned pending the Friday hearing. As to each seizure, state criminal complaints have been filed and are pending (A. p. 118).

On Friday, counsel for Petitioners appeared before the Orange County Superior Court and stated that he did not believe the state court had jurisdiction to hold the hearing and when the court declared itself ready to proceed on the merits, the attorney walked out of the courtroom. The state court viewed the movie, heard evidence and issued its order of seizure for all copies of the film in the theater's possession (A. pp. 110-113).

On August 1, 1974, a message was left with Deputy District Attorney Sears which stated that Mr. Brown had an appointment with Judge Ferguson for 10:00 a.m. on Saturday morning, August 3, 1974, and that he would request an order (unspecified) at that time. On August 2, 1974, when Mr. Brown's associate appeared in the state court, no service was made of any type and nothing was said about the Saturday appointment to Appellant Sears or to other Appellants (A. p. 119).

On Saturday, August 3, 1974, the Federal Court issued an order to show cause *in re* contempt and a temporary restraining order. All defendants in the Federal action were ordered to appear on August 12, 1974, and show cause why they should not be found in contempt of the order to return issued in the declaratory judgment of the three-judge court. Seizures of the movies "Deep Throat" and "Devil in Miss Jones" were temporarily restrained as violative of the June 4, 1974, order and defendants were further ordered to show cause why future seizures and prosecutions should not be prohibited and all items seized ordered returned (Jurisd. Stat. E). In all other respects Appellees' request was denied.

On August 12, 1974, Judge Ferguson, one of the three-judge panel, after hearing argument, indicated that the three-judge court was considering the issue of whether the July 26, 1974, *Miller v. California* opinion of this Court required reversal but further indicated that the issue was a "difficult one" and that he did not know *when* an opinion by that court would be forthcoming.

On August 22, 1974, a notice of direct appeal to the United States Supreme Court pursuant to 28 U.S.C. 1253 having been duly filed, the appropriate filing fees having been duly paid, the record on appeal having been duly certified and the *jurisdictional statement* having been duly served, *the appeal was docketed with the United States Supreme Court.*

On September 30, 1974, the three-judge court issued its supplemental opinion and its purported amended judgment in which the court reiterated its finding that the California obscenity statutes are unconstitutional

on the theory that the dismissal "for want of a substantial federal question" of the appeal in *Miller v. California*, ... U.S. ....., 41 L.Ed.2d 1158 by the United States Supreme Court is not a decision on the merits of binding precedential value (A. pp. 121 and f).

The three-judge court, in that opinion, modified the judgment as follows:

> At the January 29th proceeding in the Municipal Court, the Assistant District Attorney stipulated with defense counsel that the money would be returned to the plaintiffs here on their agreement that the police could make copies of the bills and cash and that the copies could then be admitted at trial. The Municipal Court judge agreed that "the stipulation will be received as stated." The money was thereupon returned.
>
> It appears that there should be no difficulty whatsoever in following a similar approach in returning three of the films to the plaintiffs. If that transaction will require petitioning the state court to release the films, the burden is upon the defendants to so petition.
>
> Paragraph *two* of the judgment of this court will be amended to read as follows:
>
> 2. The defendants shall in good faith petition the Municipal Court of the North Orange County Judicial District to return to the plaintiffs three of the four film prints seized from the plaintiffs on November 23 and 24, 1973, in the City of Buena Park.
>
> Except as the judgment will be so modified, the motions of the defendants are denied.

Summary of Argument.

A. The complaint sought injunctive relief alleging unconstitutionality of California Penal Code Section 311.2 and the convening of a three-judge court was mandated by 28 U.S.C. 2281. The order issued by the three-judge court on June 4, 1974 requiring the return of all seized copies of the film is injunctive in nature. The modified order issued by the court on September 30, 1974 requiring the prosecuting authorities to *in good faith* petition the state court for the return of the films is also injunctive. This type of order interferes with the proper enforcement of the state laws in that it requires an officer of the court to ask the state court to contravene the orders of a state court of higher jurisdiction; it presumes collateral appellate jurisdiction over the state courts; it requires the prosecuting authorities to forego the performance of their statutory duty under penalty of contempt. Both orders give this Honorable Court jurisdiction under the principles enunciated in *Perez v. Ledesma*, 401 U.S. 82 and *Allee v. Medrano*, ... U.S. ....., 94 S.Ct. 2191.

B. The order of June 4, 1974 was a final and appealable order, in that the Petitions for rehearing filed by Appellants were not of the type which deprive the rule of finality. Moreover, injunctive orders are appealable under 28 U.S.C. 2253 even if not final. Since the modified order is before the court and nothing remains to be done in the court below and the primary issue is the jurisdiction of the three-judge court to act the court can properly consider the totality of the controversy and the order is "final" for purposes of the court's jurisdiction under the principles of *Hudson Distributors v. Eli Lilly & Co.*, 377 U.S. 386, 389 n. 4, and

Local No. 438 Construction and General Laborers Union v. Curry, 371 U.S. 542, 548-552.

C. Where, as here, the three-judge court was improperly convened and there is a complete lack of jurisdiction in the district court because the complaint does not present a substantial federal question, the court on an appeal under 28 U.S.C. 1253 has the power to reverse the decree of the three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont Northern R. Co. v. United States*, 280 U.S. 469; *Smallwood v. Gallardo*, 275 U.S. 56, 62.

D. Where, as here, there is identity of interest between the federal plaintiff (the theater owner) and the defendants in the state court criminal proceedings (the theater manager) and the injury alleged by the federal plaintiff in his federal complaint clearly consists of the very same facts which underly the state criminal complaint and must thus be decided by the state court, the federal plaintiff has the ability to vindicate his rights in the state court. Conflicting decisions by the state and federal courts are unavoidable and comity requires that the criminal proceedings pending in the state court be imputed to the federal plaintiff. *Steffell v. Thompson*, 415 U.S. ...., 94 S.Ct. 1209 (U.S. March 19, 1974); *Allee v. Medrano*, ... U.S. ...., 94 S.Ct. 2191, 2208 (concurring opinion). Interference by the three-judge court which is admittedly dependent on the determination that no state proceedings were pending at the time the action was filed is therefore improper and abstention was mandated.

E. When, as in the case at hand, state criminal proceedings were filed against the federal plaintiff *one day*

after the filing of the federal complaint, and long before the three-judge court heard the matter, criminal proceedings are pending, the principles of *Younger v. Harris,* 401 U.S. 37 apply. This conclusion is mandated by the provisions of 28 U.S.C. 2284(5), by practical considerations such as the need for investigation of the involvement of parties (theater owners, publishers, etc., who are not present on the premises) and is supported by the rationale and the holdings of *Allee v. Medrano, supra; Steffel v. Thompson, supra* (concurring opinion) and *Perez v. Ledesma,* 401 U.S. 82, 103. The court's determination that the filing of criminal proceedings against the federal plaintiff one day after the filing of the federal complaint did not preclude intervention is erroneous. The pending criminal complaint against the federal plaintiff at the time of the federal court's hearing on the matter mandated abstention.

F. Dismissal of an appeal for want of a substantial federal question is a decision on the merits and indicates that a claim that the state statute is unconstitutional *does not* present a "substantial federal question." The conclusion of its binding value as precedent is inescapable in that where a decision of a state court is based on a criminal statute the ground of appeal under 28 U.S.C. Section 1257(2) is the claimed invalidity of the state statute. A declaration that the claim of unconstitutionality "does not present a substantial federal question" necessarily comports a ruling that the claim of unconstitutionality lacks merit. *Eaton v. Price,* 360 U.S. 246; *Ahern v. Murphy* (C.A. 7, 1972) 457 F.2d 363, 365; *Cross v. Bruning* (C.A. 9, 1969) 413 F.2d 678. The *Miller v. California,* .... U.S. ...., 41 L.Ed.2d 1158 decision of this Honorable Court, therefore, is controlling, requires a finding that the complaint fails in

that it does not present a substantial federal question, and mandates dismissal of the complaint.

G. Only a court composed in the manner mandated by 28 U.S.C. 2284 has jurisdiction to grant injunctive relief. The requirements of the statute underly the totality of the procedure in that the judge to whom the case is originally assigned is the one who determines the facts and who controls the case. He is also the one to whom the case is returned after the three-judge court is dissolved and who has the responsibility for the adjudication of collateral and ancillary proceedings. (See *e.g., Hamilton v. Nakai* (C.A. 9, 1971) 453 F.2d 152; *Public Service Commission v. Brashear,* 312 U.S. 621.) The failure of the Chief Judge to follow the mandates of the statute and his unexplained removal of the judge who certified the case from the three-judge panel after that judge had made factual findings in favor of appellants, deprived appellants of due process and resulted in an improperly constituted court without authority to grant injunctive relief.

H. The three-judge court found that appellants' acts [consisting of seizures of four copies of a film under four warrants issued by a magistrate who had personally seen at least two of the versions seized and followed by an adversary hearing at which the film was found to be obscene beyond any reasonable doubt] constituted harassment. The fact that the state court on appeal declared the seizures to have been proper, and the adversary hearing to have been properly conducted; this Honorable Court's dismissal of the *Miller v. California, supra,* appeal; the finding in *People v. Enskat,* 33 Cal. App.3d 900 that the California statute is constitutional, and Judge Lydick's finding that the seizures were con-

stitutionally proper, *preclude* a finding that the criminal proceedings were instituted in "bad faith" and without the hope of obtaining a conviction and render the finding of the three-judge court erroneous as a matter of law. Abstention was therefore mandated under *Younger v. Harris,* 401 U.S. 37.

I. California Penal Code Section 311.2 as construed by prior decisions of the California Supreme Court and by the California Appellate Courts specifically defined obscene material as material depicting or describing explicit acts of masturbation, oral copulation, sadism, masochism and graphic depiction of sexual activity as constituting "hard core" pornography. The statute, therefore, is constitutional under the *Miller v. California,* 413 U.S. 15, test as explained in *Hamling v. United States,* .... U.S. .....

ARGUMENT.

I.

The Jurisdiction of This Honorable Court Is Properly Invoked in That Both Orders Are Injunctive in Nature Within the Meaning of 28 U.S.C. 1253.

The original order of the court, issued on June 4, 1974, ordered the return of films seized under state search warrants.

The practical effect of the court's order to return all copies of the film was to collaterally overrule the state appellate court finding that the search warrants were valid and validly issued (R. p. 319). Counsel for the theater owner and the three-judge court argued that interference with the state proceedings was minimal because only one copy was needed as evidence (A. p. 94, R. p. 594). Such an argument ignores reality. Interference with the state court trial exists *primarily* because under California Law items seized under a validly issued search warrant are in *custodia legis* even when they are in the physical custody of the police (*People v. Superior Court*, 28 Cal.App.3d 600).

Where, as here, the items are in the direct custody of the state court (who is not even made a party to the proceedings) (A. p. 37, R. p. 72) the order to return can only be considered as directed to the state court. This type of interference, subjecting as it does the prosecuting authorities to possible contempt proceedings of *both* courts, is indeed a type of interference which is intolerable. Additionally, comity and the interrelated principles of federalism can hardly be said to have been served by allowing a lower federal court to have appellate jurisdiction over the orders of the state appellate courts.

Moreover, the argument of both the three-judge court and of the theater owner ignores crucial facts. The four films were seized under four separate warrants *because* the copies shown were different one from the other. Each copy of the film would thus have *had* to be shown to the jury in the state prosecution unless a stipulation was obtained from counsel that *for purposes of trial* the four copies would be considered to be identical. Such a stipulation was in fact entered into during the state municipal court proceedings on the motion to suppress (A. pp. 78-79, R. pp. 371-390).

The modified order of September 30, 1974, is no less disruptive. There, while agreeing that technically the prosecution might have a point in that the films are in the custody of the state court, the federal court modified the judgment by striking the prior order to return and by substituting an order requiring the prosecution to *in good faith* petition the state court for the return of the films. The prosecutor is an officer of the state court and bound by his oath to uphold the orders of the state courts. The prosecutor is the one whose duty it is to defend the interests of the People of the State of California. Under the particular facts of this case the municipal court, at the hearing on the motion to suppress, granted the theater owner's motion as to two of the copies because it found the last two warrants insufficient on their face "because" they did not allege probable cause to believe the films were different (A. p. 86). The issue of obscenity was not raised by the theater owner nor determined by the municipal court (A. p. 77, R. pp. 365-367). Neither that court nor the three-judge court viewed the films to ascertain whether the films were *in fact* different (A. pp. 87-88).

The prosecution appealed the suppression order (A. p. 87, R. pp. 404-405). The state appellate court held the four seizures to have been proper and declared the films contraband (and therefore non-returnable) (A. p. 131).

An order to the prosecution to petition the municipal court for the return of the films and to do so *in good faith* asks the prosecution to defy the final order of the appellate court. It asks the prosecution to renege the very law he is sworn to uphold. It asks the prosecution to request the municipal court to defy the order of the state court. The threat of possible contempt proceedings in federal court interjects an element of *self* interest and raises a conflict of interest sufficient so as to require the attorney general of the state to step in and represent the interest of the people of the state. It thus *precludes* the prosecutor from performing the duties of the office to which he has been elected.

The supplemental opinion of the three-judge court justified the issuance of its order on the basis that a similar proceeding was used to return the money seized. This argument ignores the fact that the return of the money was mandated by *Buker v. Superior Court*, 25 Cal.App.3d 1085 where the state appellate court held that *noncontraband* items such as money could not be retained after a stipulation that copies or photographs could be used as evidence. More important, it ignores that fact that an order of the appellate court declared the film contraband and nonreturnable. Both types of injunction differ from the injunction in *O'Shea v. Littleton*, ... U.S. ...., only in their context. Both are similar to the *O'Shea* injunction in that both purport to punish as contempt actions of judicial of-

ficers taken during the course of state criminal proceedings.

Both types of orders are similar to the order to return issued in *Perez v. Ledesma*, 401 U.S. 82, in which as pointed out by Mr. Justice Douglas in *Allee v. Medrano, supra*, at note 8, the jurisdiction of this Honorable Court was properly invoked. There as here:

> The District Court went on to determine that the arrests of the plaintiffs and the seizures incident thereto were unconstitutional because no prior adversary hearing had been held, 304 F. Supp. 662, 667, and therefore issued an order suppressing the evidence in the state court case. We reviewed that order on the merits, assuming it was properly before us as an appeal "from an order granting or denying . . . an interlocutory or permanent injunction in any civil" action required to be heard by a three-judge court. See 401 U.S., at 89 (concurring opinion). The basis for ancillary jurisdiction here is at least as compelling.

Mr. Justice Berger's concurring and dissenting opinion points out that while he disagrees with the majority on the issue of the court's jurisdiction in *Medrano, supra*, he does so because he believes the *Medrano* case to be distinguishable from *Perez v. Ledesma:*

> Although the District Court in *Perez* stated that it held that state statute to be facially constitutional, the decision of the District Court there that the arrests and seizures were unconstitutional appears in fact to have derived from a broad condemnation of obscenity statutes, including the state statute dealt with in that case, without provisions incorporated therein protecting against criminal liability for acts occurring prior to an adversary

judicial determination of obscenity. Delta Book Distributors, Inc. v. Cronvich, 304 F.Supp. 662, 667 (E.D.La. 1969). In effect, then, the District Court in *Perez* acted broadly to render a nullity the Louisiana statute, see 304 F.Supp., at 673 (Rubin, J., dissenting), and we, therefore, properly had jurisdiction over the appeal and we properly ruled on the question of whether the District Court could have interfered with state court criminal proceedings by invalidating arrests and seizures made without any prior adversary hearing.

Both opinions of the three-judge court in this case make clear that the injunctive orders stem from and are inextricably bound with their finding that the state statute is unconstitutional. Here as in *Perez v. Ledesma* this Honorable Court has jurisdiction to review the merits.

II.

The June 4, 1974, Decision Was Not Robbed of Finality by the Filing of Notices of Motions.

Appellants submit that the supplemental opinion and the modification of judgment are void because the three-judge Court had lost jurisdiction over the action since the notice of appeal had been timely filed on July 5, 1974 (a Monday). The record on appeal had been duly requested and the appeal docketed with this Honorable Court on August 22, 1974—nearly ten days prior to the entry of the supplemental opinion and of the amended judgment. See *e.g. Sumida v. Yumen,* (C.A. Hawaii 1969) 409 F.2d 654, cert. den. 405 U.S. 964; *O'Brien v. Avco* (D.C. N.Y. 1969) 309 F.Supp. 703; *Hogg v. United States* (C.A. Ky. 1969) 411 F.2d 578.

In the analogous case of *United States v. Frank B. Killian*, 269 F.2d 494, the United States Court of Appeals for the Sixth Circuit, pointed out that the notice of appeal operated to divest the district court of jurisdiction to rule on the government motion to reconsider, brought under Rule 60(b). The Court stated:

> Next to be considered is appellee's opinion here to dismiss the appeal as prematurely brought. Appellee's argument, briefly put, is that the Government's motion to reconsider and for relief from judgment suspended the finality of the order of dismissal, and so made the notice of appeal premature. There is no merit in this point. See: Fed. R.Civ.P. rule 60(b)(6): *Raughley v. Pennsylvania R. Co.*, 3 Cir., 1956, 230 F.2d 387.
>
> The Government's notice of appeal, filed August 4, 1958, operated to transfer jurisdiction to this court (Fed. R.Civ.P. rule 73), and thereafter the District Court had no jurisdiction of the cause, other than to act in aid of the appeal as empowered by the Federal Rules of Civil Procedure. *In re Federal Facilities Realty Trust*, 7 Cir., 1955, 227 F.2d 651, 654. Having no jurisdiction to entertain the Government's motions for reconsideration and for leave to amend while an appeal was pending, the District Court's order overruling those motions was a nullity.

In *Keohane v. Swarco Inc.*, 320 F.2d 429 the Court concluded that a notice of appeal transfers jurisdiction even where a timely motion had been made under Rule 52. The Court there states:

> In our judgment, the motion to amend was timely made. It tolled the running of the time for appeal in No. 15,284. Rule 73; *Leishman v.*

Associate Wholesale Electric Co., 318 U.S. 203, 63 S.Ct. 543, 87 L.Ed. 714; *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160. Since the District Court had not passed upon the motion to amend at the time the notice of appeal was filed, the judgment of dismissal was not final. The appeal was, therefore, premature. *Reconstruction Finance Corp. v. Mouat*, 184 F.2d 44 (C.A. 9); *Segundo v. United States*, 221 F.2d 296 (C.A. 9).

The taking of the appeal even though from an interlocutory nonappealable order nevertheless transferred jurisdiction to the Court of Appeals. The orders entered by the District Court on January 16th, March 6th and March 14, 1963 were null and void since that court was without jurisdiction to make them after the appeal had been taken. *Merritt-Chapman & Scott Corp. v. City of Seattle*, 281 F.2d 896 (C.A. 9); *United States v. Frank B. Killian Co.*, 269 F.2d 491 (C.A. 6); *Hirsch v. United States*, 186 F.2d 524 (C.A. 6).

The three-judge court should not be allowed to defeat the jurisdiction of this Court to hear a matter of so great an impact to the State of California by being allowed to consider a notice of motion of judgment as sufficient to satisfy the requirements of Rule 52 of the Federal Rules of Civil Procedure because served and filed ten days after entry. Although the Federal Court has great discretion in waiving defects in pleadings, it should not be allowed to construe a motion to be other than what it is. Notifying the clerk of the party's intention to file a motion for new trial *does not* constitute the filing of a motion for new trial and does not extend the time for appeal [See *e.g.*, *Wagoner v. Fairview*

Consol. School Dist. No. 5 (C.A. Colo. 1961) 289 F.2d 480, cert. den. 368 U.S. 921]. A motion which asks for rehearing and for vacation of judgment cannot be treated as a motion to amend under Rule 52. Indeed, as has so often been stated, a motion under Rule 52 cannot be made to serve as a vehicle for rehearing (*Minneapolis Honeywell v. Midwestern Instrument* (D.C. Ill. 1960) 188 F.Supp. 248, affirmed 298 F.2d 36; *Heikkila v. Barber* (D.C. Cal. 1958) 164 F.Supp. 587; *Blair v. Delta Air Lines* (D.C. Fla. 1972) 344 F.Supp. 367).

Appellants' intended purpose, as to the type of motion they intended to file, is evidenced by the fact that the notices in conformance with Rule 3 of the Local Rules of the United States District Court, Central District of California, notify opposing party that the motion *shall* be made on July 1, 1974 (A. p. 90, R. pp. 531, 533A), a requirement which Rule 3 specifies is inapplicable to motions under Rule 52.

Similarly, neither notice of motion could in any way be considered as a motion under Rule 59 of the Federal Rules of Civil Procedure since the procedural requirements for such a motion which are set forth in Rule 17 of the Local Rules were deliberately bypassed.

Appellants further submit that even if the September 30, 1974 judgment were to be considered to have been properly entered, the prematurity of the notice of appeal should be disregarded as an irregularity not affecting substantial rights and should not be allowed to justify a dismissal of the appeal (See *Lemke v. United States*, 346 U.S. 325, 98 L.Ed. 3; *see also Curtiss Gallery and Library Inc. v. United States* (C.A. Cal. 1967) 388 F.2d 358; *Ruby v. Secretary of United States Navy* (C.A. 9, 1966) 365 F.2d 385).

III.

The "Finality of Judgment" Test Is Not Applicable to Cases Arising Under 28 U.S.C. 2281 in That the Court Has Jurisdiction Over Interlocutory as Well as Over Final Injunctive Orders.

Unlike other statutory provisions 28 U.S.C. 1253 allows for appeals from "an order granting or denying . . . an *interlocutory* or permanent injunction." The requirement of finality set forth in 28 U.S.C. 1257 is thus not applicable. Moreover, the basic issue for determination is the same in both the opinion of June 4, 1974, and that of September 30, 1974. The principles as to finality set forth by this Court in *Local No. 438 Construction and General Laborers Union v. Curry*, 371 U.S. 542, 548-552 are thus applicable since nothing remains to be done by the court below and unless review is had at this juncture, appellants "must face further proceedings in the [lower] court which the lower court has no power to conduct" *Curry, supra*, 371 U.S. at 550.

IV.

The Jurisdiction of the Three-Judge Court Is Obviously Lacking and the Court Can Resolve the Merits of the Controversy by Resolving the Jurisdictional Issue.

As most aptly pointed out by Stern and Grossman, *Supreme Court Practice*, Sec. 2.14, page 53:

> The three-judge-court procedure is not properly invoked unless the constitutional question raised is "substantial." *Ex-parte Poresky*, 290 U.S. 30; *Flast v. Cohen*, 392 U.S. 83, 91, n. 4. See Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19 La. L. Rev. 813 (1959). "The lack of substantiality in a federal question may appear either because it is

obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court, as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255; *Swift & Co. v. Wickham*, 382 U.S. 111, 115; *Zemel v. Rusk*, 381 U.S. 1, 6; *Bell v. Waterfront Commission*, 279 F.2d 853 (C.A. 2).

As thereafter pointed at Section 2.17 at page 70:

> If there is a complete lack of jurisdiction in the district court, whether composed of one or three judges, the Supreme Court has power on a purported appeal under §1253 to reverse the decree of a three-judge court and remand the case with directions to dismiss the complaint for want of jurisdiction. *Piedmont & Northern R. Co. v. United States*, 280 U.S. 469. This power of the Court exists regardless of whether the three-judge court has entered a judgment for the plaintiff or the defendant. As long as a decree was entered on the merits, the Court has jurisdiction to reverse it and to order a dismissal for want of jurisdiction. See *Smallwood v. Gallardo*, 275 U.S. 56, 62; *Piedmont & Northern R. Co. v. United States, supra*, at 478.

In the case at hand, the jurisdictional statement and Judge Lydick's order (A. p. 57, R. pp. 182-185) show that the jurisdiction of the three-judge court is based on that Court's finding that the constitutionality of the California Obscenity Statutes presents a "substantial federal question." This Honorable Court in *Miller v. California*, ... U.S. ...., 41 L.Ed. 1158, dismissed an appeal presenting this identical issue "for want of a substantial Federal question." The basis for the three-

judge court jurisdiction in this case is thus clearly non-existent.

Although the three-judge court purported to also base its jurisdiction on the alleged findings of harassment, those findings are contrary to the ones made by Judge Lydick—the judge who certified the case as to the constitutionality of the California statute. Had the case not been certified, Judge Lydick's findings would unquestionably be unassailable on appeal. (See, *e.g.*, *Sims v. Dial*, 350 F.Supp. 747 where a three-judge federal court rejected the "novel proposition of law" that actions paralleling the ones in the case at hand established bad faith harassment as a matter of law.)

Absent the presence of a substantial federal question as to the constitutionality of the statute, the three-judge court *and* Judge Lydick should have dismissed the complaint.

In light of the above factors, should the Court determine that it has no jurisdiction in this action, reversal of the three-judge court decree and remand with directions to dismiss the complaint for want of jurisdiction would seem the most appropriate means to restore order to the procedural nightmare created by the presently existing conflicting orders of the State and Federal Courts.

V.

The Federal Court Should Have Abstained From the Granting of Injunctive and Declaratory Relief Because State Criminal Proceedings Were Pending Against Agents in Privity With the Plaintiff.

The factual situation before the court presents the multitude of conflicts and potential problems which arise when the principles enunciated by this Honorable Court in *Younger v. Harris*, 401 U.S. 37 and *Steffel v.*

Thompson, 415 U.S. .... are not narrowly construed and strictly followed. Much of the confusion in the application of those principles stems from a misunderstanding of the proper function and intended purpose of 28 U.S.C. 2284 and of 28 U.S.C. 1201. Clarification of the proper use of those acts would no doubt help to prevent some of the existing abuses.

A complaint alleging unconstitutionality of a state statute is not per se sufficient to state a cause of action. It only sets forth the first requirement for federal court jurisdiction—the existence of a federal question; the alleged injury and the facts in support thereof are controlling on whether the complaint sets forth a cause of action, that is, a presently existing controversy warranting a specific type of relief.

Thus, allegations of past wrongful acts by state officials for example, without a showing of *some future threat* are possibly sufficient to allege a cause of action for damages under 42 U.S.C. §1983. They are, however, *insufficient* if the remedy sought is injunctive or declaratory in nature since both remedies seek to redress future wrongs.

Allegations that a statute is going to be enforced against "persons" *other than the plaintiff*, do not set forth a live controversy and are insufficient to allow for the grant of either injunctive or declaratory relief as to the plaintiff absent a relationship which allows the plaintiff to identify with the threat. As pointed out by Chief Justice Burger in *Allee v. Medrano*, ... U.S. ...., 94 S.Ct. 2191, 2208:

> There is an identity of interest between the Union and its prosecuted members; the Union may seek relief only because of the prosecutions

of its members; and only by insuring that such prosecutions cease may the Union vindicate the constitutional interests which it claims are violated. The Union stands in the place of its prosecuted members even as it asserts its own constitutional rights. The same comity considerations apply whether the action is brought in the name of the individually arrested Union member or in the name of the Union, and there is no inequity in requiring the Union to abide by the same legal standards as its members in suing in federal court. If the Union were unable to meet the requirements of *Younger*, its members subject to prosecution would have a full opportunity to vindicate the First Amendment rights of both the Union and its members in the state court proceedings. Any other result would allow the easy circumvention of *Younger* by individuals who could assert their claims of First Amendment violations through an unincorporated association of those same individuals if the association is immune from *Younger* burdens.

Likewise, where the required injury sought to be alleged under 42 U.S.C. 1983 and 42 U.S.C. 1343 consists of past enforcement of an unconstitutional statute against persons other than the plaintiff and threatened future enforcement against other persons, the alleged injury is only sufficient to state a live controversy if the relationship between the plaintiff and the parties who suffered and will suffer the injury is such as to allow the plaintiff to act on behalf of those parties. If there is no identity of interests, the cause of action must fail because no controversy between the parties before the court has been presented (See *e.g.*, *O'Shea v. Littleton*, ...U.S. ....).

Under the facts of the case under consideration, the theater owner did not allege that prosecution was threatened against him. His request for injunctive and for declaratory relief was specifically made to rest on four seizures conducted against *the theater and his employees* which he alleged were undertaken to prevent *the theater* from exhibiting the film (A. pp. 11-15, R. pp. 6-9). His right to federal relief is thus only determined through his relationship to the theater and to his employees.

If his relationship is insufficient, his right to relief fails because he has failed to allege the required personal interest. By the same token, if his relationship is sufficient to give him standing, it is sufficient because the theater, the employees, and the theater owner have identical interests.

A determination of whether criminal proceedings are pending in the state court is thus only meaningful if made in terms of criminal proceedings pending against the theater and the theater employees since the theater owner in this case "stands in the place of his [agents] even as he asserts its own constitutional rights" (*Allee v. Medrano, supra*).

In *Steffel v. Thompson*, 415 U.S. ...., 94 S.Ct. 1209, 1217 the propriety of granting declaratory and injunctive relief *when no state criminal proceeding is pending* is bottomed on the recognition that relevant principles of equity, comity and federalism "have little force in the absence of a pending state proceeding" because:

> When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that

> circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity *in order to avoid becoming enmeshed in a criminal proceeding. Cf. Dombrowski v. Pfister,* 380 U.S. 479, 490, 85 S.Ct. 1116, 1123, 14 L.Ed.2d 22 (1965).

Where the federal complaint alleges illegality of the very seizures which procured the evidence upon which the state criminal complaints rest and the unconstitutionality of the state statutes under which the criminal complaint has been brought against agents of the federal plaintiff, federal intervention unavoidably results in duplicative legal proceedings, in conflicting decisions, and in opposite factual determinations by the state and federal courts.

The conflicts are perhaps best exemplified by the impossibility of giving *res judicata* effect to the decisions either of the state or of the federal court. Although, as pointed out by the majority of this Honorable Court in *Steffel,* the issue of whether a declaratory judgment has *res judicata* effect is not free from difficulty, it is apparent from the majority opinion and the concurring opinions in that case, that several members of the court agree that the federal declaratory judgment has *some res judicata* effect.

In the case at hand, the factual issues concerning the legality of the seizure were first determined by the state court at the adversary hearing (A. p. 74, R. pp. 283-319). Those same issues were re-presented, reargued and redetermined in the state criminal proceedings in a motion brought by the agents of Plaintiff *prior* to the filing of the federal action, a motion in which the federal plaintiff joined—*one day* after the filing of the federal complaint (A. p. 76, R. pp. 369-399). The state court determination was appealed and became final after the judgment of the three-judge court had issued but long before the three-judge court judgment became final. Under California law, the judgment of the three-judge court not being a final judgment would not and could not be given *res judicata effect* (*See, e.g., Woodbury v. Baeman*, 13 Cal. 634; *Di Nola v. Allison*, 143 Cal. 106). Additionally, the record shows that prior to *any action* being taken by the three-judge court, the three-judge court was informed by both parties that the validity of the seizures had been litigated by the state court (A. pp. 80-81, R. pp. 365-367). Under the circumstances, a proper applicability of the *res judicata* doctrine would have required the state court finding to be given *res judicata* effect in the federal court action.

Moreover, under the same state laws, one of the three prerequisites to the application of the *res judicata* doctrine is the jurisdiction of the former tribunal to determine the issue litigated (*See e.g., Sonnicksen v. Sonnicksen*, 45 Cal.App.2d 46; *Boggs v. Clark*, 37 Cal. 236). And a judgment void on its face may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or by strangers. It is simply a nullity and can be neither the basis nor evidence of any right whatever (*See e.g., Nagel v. P. &*

M. Distributors, Inc., 273 Cal.App.2d 176; *Fox v. Mick*, 20 Cal.App. 599). Where lack of jurisdiction appears on the face of the record, a judgment is void and can be attacked (*Scoville v. Keglor*, 29 Cal.App.2d 66; *Aldabe v. Aldabe*, 209 Cal.App.2d 453; *Baldwin v. Foster*, 157 Cal. 643; *In re Cohen*, 107 Cal.App. 288; *Whitwell v. Barbier*, 7 Cal. 54). The mere fact that the judgment has been issued by a federal court does not wholly immunize it from collateral attack. Thus in *Sato v. Hall*, 191 Cal. 510, for example, the California Supreme Court held the federal court judgment to be void and stated:

> The appellant contends that the order admitting him to citizenship is a final judgment of a court of competent jurisdiction, and that this judgment is conclusive as against collateral attack.
>
> This position is untenable. The judgment or certificate shows that the petitioner is a member of a yellow race, and this showing renders the judgment void unless its integrity is preserved by some one of the acts to be hereafter noted. If petitioner were ineligible to citizenship, and this ineligibility appeared upon the face of the judgment of the court admitting him to citizenship, that court was without jurisdiction and its judgment was void. . . .
>
> . . . we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the superior court, admitting petitioners to citizenship, that court was without jurisdiction and its judgment was void. (*In re Gee Hop* (D.C.), 71 Fed. 274; *In re Yamashita*, 30 Wash. 234 [70 Pac. 482].)

Where, as in a federal declaratory judgment action, the validity of the federal judgment depends on the existence of a "substantial federal question," the above cases would allow the state court to redetermine the jurisdiction of the federal court—that is, the substantiality of the federal question.

The net result is a proliferation of collateral attacks on each of the judgments and the utter breakdown of the principles of comity and of federalism *as well* as duplication of judicial proceedings. Avoidance of conflicts and of duplicative proceedings can only be achieved by imputing the existence of state criminal proceedings to the federal plaintiff in cases where common interest and activity afford him the ability to vindicate his rights in the state action and where claims to be adjudicated by the federal court are those same claims which are, at the same time, *sub judice* in ongoing state criminal proceedings. In such cases as Mr. Justice Burger in *Allee v. Medrano, supra,* makes clear:

> If there are state court prosecutions against the individual appellees or the Union under these statutes then *Younger* requirements must be met. If there are prosecutions against members of the Union under these statutes (and the Union asserts standing derivatively) then the *Younger* hurdle must be met for the reasons stated. If standing of individual appellees or the Union to challenge one of the statutes is based *solely* on threatened prosecutions, and the relief pursued below with respect to that statute is declaratory only then *Younger* does not apply. *Steffel v. Thompson, supra.* If appellees seek injunctive relief with respect to the operation or enforcement of a statute for the violation of which prosecutions are threatened, the question of whether *Younger* applies has not been an-

swered by this Court. *Steffel v. Thompson, supra,* .... U.S., at .... Finally, if the Union sues on the basis of injury to its members, since, as to a statute challenged, one member must, if suing on his own behalf, meet the requirements of *Younger,* the Union must do so, even though other of its members would not be so burdened if they had brought suit individually. The requirements of *Younger* are not to be evaded by artificial niceties.

The determination of the three-judge court that it had jurisdiction over the proceedings because state criminal proceedings were not pending is erroneous and requires reversal of the injunctive relief and of the declaratory relief.

VI.

The Federal Court Should Have Abstained Because State Criminal Proceedings Had Been Filed and Were Pending at the Time the Three-Judge Court Considered the Case.

The Opinion of the Three-Judge Court (p. 8) stated that it need not abstain from involving itself in this matter as there is no danger of duplicative proceedings or disruption of the state criminal justice system. This finding of the court is belied by the existence of the pending criminal charges.

The court's Opinion relies heavily upon *Steffel v. Thompson,* 415 U.S. ....., 94 S.Ct. 1209 (1974). The United States Supreme Court there specifically set out the focus of its holding in that case as follows:

> The case presents the important question reserved in *Samuels v. Mackell,* whether declaratory relief is precluded when a state prosecution has been threatened but is not pending. . . . (94 S.Ct. 1213) (Citations omitted).

The Federal court interpreted this to mean that the federal court could take jurisdiction if state proceedings had not been filed at the time the federal complaint was filed. The majority of the justices, however, have actually expressed agreement on the fact that the propriety of abstention is to be determined at the time of the *hearing*. The concurring opinion of Mr. Justice Brennan in *Perez v. Ledesma*, 401 U.S. 82, 103, 27 L.Ed.2d 701, 716 (1971), which expresses the views of Mr. Justice White and Mr. Justice Marshall, specifies that:

> The availability of declaratory relief was correctly regarded to depend upon the situation at the time of the *hearing* and not upon the situation when the federal suit was initiated. See *Golden v. Zwickler*, 394 U.S. at 108, 22 L.Ed.2d at 117 (Emphasis added).

The concurring opinion of Mr. Justice Rehnquist (with whom the Chief Justice joined) in *Steffel v. Thompson*, 415 U.S. ....., 94 S.Ct. 1209, 1225-1226, indicates that:

> . . . any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of *Samuels*.

The limitation imposed on Mr. Justice Rehnquist's views by the concurring opinion of Mr. Justice White are to the effect that:

> . . . a federal suit challenging a state criminal statute on federal constitutional grounds could be sufficiently far along so that ordinary consideration of economy would warrant refusal to dismiss the federal case solely because a state prosecution has subsequently been filed and the federal question may be litigated there.

Mr. Justice Douglas reiterated the same view in *Allee v. Medrano, supra,* where he states:

> *Younger* and its companion cases are grounded upon the special considerations which apply when a federal court is asked to intervene with pending state criminal prosecutions. *Steffel v. Thompson,* 415 U.S. ..... Although both parties here have assumed the relevance of *Younger,* we have been unable to find any precise indication in the District Court opinion or in the record that there were pending prosecutions *at the time of the District Court decision* (Emphasis added).

From a practical standpoint, appellants submit, the existence of a state criminal complaint cannot be determined as of the time the federal complaint is filed without being confronted by the "duplication of proceedings" which render the granting of declaratory judgment relief improper. Generally, in a case involving the sensitive area of obscenity in which the validity of the search and seizure plays a significant part, a criminal complaint is filed only against the persons who have been subjected to arrest. The pleadings are thereafter amended to include additional parties as the investigation progresses and after a hearing on the issue of obscenity has been had.

In addition, although in the case at hand appellees chose not to serve the federal complaint until January 14, 1974, in the average case a complaint seeking a temporary restraining order, a preliminary injunction, a final injunction, damages *and* a declaratory judgment is *filed and served* at the time the temporary restraining order is requested. The record before the court in this case, in fact, shows that such a complaint was filed (although not *served*) on November 29, 1973. A prompt

hearing on the requested temporary restraining order is mandated by the statute and a prosecutor who is ordered to appear and defend his actions in the Federal Court is obviously reluctant to invest time and effort in the investigation of the case and in the preparation of criminal pleadings the prosecution of which might be enjoined by the federal court. Where a federal complaint is filed, therefore, a criminal complaint against the non-arrested defendants will not often be filed until after the temporary restraining order is denied. When added to the physical impossibility of immediately determining the identity of all the offenders (managers, directors, etc.) the above factors would allow declaratory judgment relief in *all* cases, a result not contemplated by either *Younger* or *Steffel*. Since the three-judge court must be convened to determine whether it has jurisdiction to hear the matter, on the other hand, no judicial effort is vasted by making the availability of declaratory relief dependent on whether state criminal court proceedings are pending at the time the hearing is had and the purposes of comity and federalism are better served.

VII.

The Federal District Court Lacked Jurisdiction Because the Federal Question Presented Lacks Substantiality.

As most aptly pointed out by Stern and Grossman, *Supreme Court Practice*, Sec. 2.14, p. 53:

> The three-judge court procedure is not properly invoked unless the constitutional question raised is "substantial." *Ex-parte Poresky*, 290 U.S. 30; *Flast v. Cohen*, 392 U.S. 83, 91, n. 4. See Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19

La. L. Rev. 813 (1959). "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court [United States Supreme Court], as to foreclose the subject." *California Water Service Co. v. City of Redding*, 304 U.S. 252, 255; *Swift & Co. v. Wickham*, 382 U.S. 111, 115; *Zemel v. Rusk*, 381 U.S. 1, 6; *Bell v. Waterfront Commission*, 279 F.2d 853 (C.A. 2).

The record of the *Miranda* case, and Judge Lydick's certification order upon which jurisdiction is bottomed show that the jurisdiction of the three-judge court is based exclusively on that Court's finding that the constitutionality of the California Obscenity Statutes presents a "substantial federal question." This Honorable Court, in *Miller v. California*, ... U.S. ...., 41 L.Ed.2d 1158, dismissed an appeal presenting this identical issue "for want of a substantial federal question."

The dissent written by Mr. Justice Brennan in the *Miller* case recites that:

> Appellant was convicted in Orange County, California, Superior Court of distributing obscene matter in violation of California Penal Code §311.2.
>
> . . .

After setting forth the text of the California Obscenity Statutes, the dissent goes on to say:

> The Appellate Department of the Superior Court affirmed, and this Court vacated the judgment of that court and remanded the case for reconsideration in light of *Miller v. California*, 413 U.S. 15 (1973), and companion cases. The Appellate Department again affirmed.

In context, the decision, therefore, makes clear that this is a conviction under the California Obscenity Statutes reconsidered and reaffirmed by a California court in light of the *Miller v. California, supra,* requirements of specificity. A dismissal of the appeal "for want of a substantial federal question" under the circumstances is a decision on the merits, determinative of the constitutionality of the California obscenity legislation as interpreted by the California Appellate Courts. This fact is pointed out in *Eaton v. Price,* 360 U.S. 246, 3 L.Ed.2d 1200, 1203 (1959), where the Court concludes:

> Votes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . .

Such a determination on the merits, of course, makes the case controlling as precedent. (See *Eaton v. Price,* 360 U.S. 246, 247, 3 L.Ed.2d 1200, 1202, 79 S.Ct. 978 [opinion of Brennan, J.]; *Ahern v. Murphy* (7th Cir. 1972) 457 F.2d 363, 365; *Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd.,* 71 Cal.2d 1215, 1221, fn. 4 [81 Cal.Rptr. 251, 459 P.2d 667]; Wright, Law of Federal Courts, 495; Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expedience in Judicial Review,* 64 Colum.L.Rev. 1, 11) and of value as precedent under the doctrine of *stare decisis. Eaton v. Price, supra; Samson Market Co. v. Alcoholic Bev. etc. Appeals Bd., supra; People v. United National Life Ins. Co.,* 66 Cal.2d 577, 591 [58 Cal.Rptr. 599, 427 P.2d 199]; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 179 F.Supp. 944, 949, fn. 4, revd. on other grounds, 366 U.S. 582, 6 L.Ed.2d 551, 31 S.Ct. 1135.)

As pointed out by *Ahern v. Murphy*, 457 F.2d 363 (7th Cir. 1972), the conclusion of its binding precedent value is inescapable in that where a decision of a state court is based on a criminal state statute, the *only* ground for appellate jurisdiction in the United States Supreme Court is an allegation under 28 U.S.C. §1257(2) that:

> There is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

Quite clearly a dismissal for want of a substantial federal question presumes a finding that jurisdiction in the United States Supreme Court exists by virtue of a claim of alleged invalidity and a ruling that the claim of invalidity lacks merit. (The United States Court of Appeals for the Ninth Circuit has so held in *Cross v. Bruning*, 413 F.2d 678 (9th Cir. 1969).)

The Supplemental Opinion seeks to avoid the impact of the above rationale by arguing that denial of certiorari in *Enskat v. California*, ... U.S. ...., 41 L.Ed.2d 1172, indicates that the Supreme Court did not intend to say what it said in *Miller*. The argument fails in light of *J-R Distributors, Inc. v. Washington*, ... U.S. ...., 41 L.Ed.2d 1166, where this Honorable Court denied the Petition for Certiorari and Mr. Justice White quite obviously on behalf of the majority of the court pointed out that:

> In this case and in 13 other cases involving issues dealing with obscenity, Mr. Justice Brennan complains that by denying certiorari or dismissing an appeal, the Court has failed to pass independently on the obscenity of the materials in-

volved. This is a task which he has insisted, see *Jacobellis v. Ohio,* 378 US 184, 187-190, 12 L. Ed.2d 793, 84 S.Ct. 1676 (1964), that the Court must perform under the approach to obscenity which he espoused and explicated for the Court in *Roth v. United States* 354 U.S 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), which he refined for himself and others in *Jacobellis v. Ohio, supra; Memoirs v. Massachusetts,* 383 U.S. 463, 16 L. Ed.2d 1, 86 S.Ct. 975 (1966); *Ginzburg v. United States* 383 U.S. 502, 16 L.Ed.2d 31, 86 S.Ct. 942 (1966); *Mishkin v. New York,* 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966); *Ginzberg v. New York,* 390 U.S. 629, 20 L.Ed. 2d 195, 88 S.Ct. 1274 (1968), but which he has now repudiated.

In response to Justice Brennan's "complaint," Justice White replied:

> Brother Brennan's complaints are wide of the mark. Obscenity cases, like others, are not immune from the standards generally governing the exercise of our appellate jurisdiction. The Court has never indicated that plenary review is mandatory in every case dealing with the issue of obscenity.
>
> . . .
>
> In six other cases, the issue of obscenity vel non is among the questions presented here, but the materials themselves have not been filed with this Court.

The six cases to which the Justice refers are set forth at note two and include *Enskat v. State of California.* In each of those cases (which include *Enskat* but not *Miller*) Justice White goes on to say:

> . . . either the Court of Appeals or the state appellate court expressly addressed the issue of obscenity and found the materials obscene under proper standards. Under these circumstances, denying certiorari is wholly consistent with our practice.

If the *Enskat* court found the materials obscene "under proper standards," *how* can the standard there used be unconstitutional? And if the standards there used are proper, how can the complaint be said to present a substantial federal question?

VIII.

Appointment of Three New Judges and Removal of the Certifying Judge From the Three-Judge Panel Rendered the Three-Judge Court Nonstatutory and Deprived It of Jurisdiction.

The record shows that the case had originally been assigned to Judge Ferguson who disqualified himself (A. p. 20, R. p. 77). The request for injunction was subsequently submitted to Judge Lydick who, on the affidavits before him, found that an injunction under the Civil Rights Act would have been improper *because* the Plaintiff had failed to make any showing whatever that Appellants had acted in bad faith (A. p. 57, R. pp. 182-185). Judge Lydick, however, did determine that a three-judge court should be impaneled to decide the constitutionality of the state statute and duly certified the case. The Chief Judge of the Circuit impaneled *three* judges: William G. East, Warren J. Ferguson and Walter Ely (A. p. 84). Since the court was not duly constituted under 28 U.S.C. §2284, it did not have jurisdiction to hear the matter and to grant injunctive relief. 28 U.S.C. §2284 specified:

> In an action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, *who shall designate two other judges,* at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

The statutory requirement that the judge to "whom the application for injunction or other relief" *shall* constitute one member of such court is integral to the very purpose of the statute since *that* particular judge is the one who makes the preliminary factual determination that a three-judge court is needed. He is also the judge to whom the case is remanded once the purpose for which the three-judge court was convened has been concluded (See *e.g., Hamilton v. Nakai,* 453 F.2d 152 (9th Cir. 1971); see also *Public Service Commission v. Brashear Freight Lines, Inc.,* 312 U.S. 621, 85 L.Ed. 1083 (1941)). His decisions on most issues of fact will be and are upheld on appeal unless patently erroneous. In a case such as the one at hand, for example, failure to include the judge who called for the convening of the three-judge court resulted in a denial of constitutional as well as procedural due process. Judge Lydick's opinion absolved Appellants of any wrongdoing. The three-judge court, based on the *same* evidence which was before Judge Lydick, made a

finding that the "uncontroverted facts" show harassment. Since a claim for damages which had originally been filed was dismissed without prejudice (R. pp. 4, 22), the finding of harassment places Appellants in the unenviable position of having had the key issue in a damage suit conclusively determined against them without a hearing on the merits.

Moreover, were this Honorable Court to find that the three-judge court was not properly convened, if Judge Lydick were a member of the panel, the case would be remanded to him and his finding as to the issue of harassment would remain viable. Under the present setup, upon dissolution of the three-judge panel, which judge would it be remanded to? Appellants contend that they have the right to have the case *heard* by the judge to whom the case was originally assigned. As Judge Aldrich so aptly stated in *Merced Rosa v. Herrero* (C.A. 1, 1970) 423 F.2d 591, 593 at note 2:

> The writer of the present opinion, speaking as one charged with this duty, believes that the argument of interrelation of the two sections of the statute which Chief Judge Biggs found to give judicial discretion to the district judge, cannot be applied to the provision relating to the chief judge, and that once the request has been formally made, the chief judge's duty is solely ministerial. There is reason for this. *It is the district judge's case*, 28 U.S.C. §2284(1). . . . (Emphasis added).

Additionally, Judge Lydick's original determination of the issue in Appellants' favor lulled Appellants into a false sense of security and, assuming but not granting a final determination of the issue to have been properly ordered submitted upon affidavits, it caused Appellants to believe no additional affidavits were needed since,

as the decision itself admits, the acts of "harassment" consisted of seizures carried out under authority of search warrants issued by a state judge who, on at least two occasions, was present at the seizure.

The statute provides that *only* a court composed as mandated by the statute can hear and determine the matter. The word "shall" is mandatory and a court of three judges which does not include the judge who first heard the matter is not a court composed under the statute and is thus not a court of jurisdiction.

IX.

Legal Actions Performed Under Validly Issued Orders of the State Court Cannot Be Termed Harassment and in the Absence of Harassment the Court's Abstention Was Mandated.

Under the rules set forth in *Perez v. Ledesma, supra,* federal intervention either by way of injunction or by way of declaratory relief should issue:

> Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown. . . .

In the case at hand, the record shows that four films were seized because they were different one from the other (A. pp. 39-41, R. pp. 71-76). Each was seized pursuant to a search warrant and the determination of the existence of substantial differences was made in at least one of the three instances in question by the magistrate prior to the issuance of the search warrant (A. p. 36, R. pp. 71-72). The existence of such differences is further supported by the affidavits which show that Appellees themselves admitted to the

existence of more than one version (A. p. 48, R. pp. 234-238).

The seizures occurred on November 23 and 24. On November 26, an order to show cause was served on the Appellees ordering them to appear in the State Superior Court for an adversary hearing on the issue of obscenity, (A. p. 64, R. pp. 12-16). Appellees alleged that "bad faith" in this case was further evidenced by the fact that Appellants obtained an *ex parte* temporary restraining order against the showing of the film (A. p. 65). Although it is true that such an order was obtained as part of the order to show cause, this Honorable Court should consider the strong protective limitations contained within the order as well as the purpose of the order. The first limitation in the order is a time factor. The order asked Appellees not to show the movie until after a judicial *determination* was held in an *adversary* hearing and provided that the adversary hearing should be had within five days or at any prior time at Appellees' request upon *one hour's* notice to Appellants (A. p. 65, R. pp. 17-18). Appellees did *in fact* request a hearing on the *same* day the order was issued and were in fact given a hearing on that *same date* (A. p. 22, R. pp. 12-16). Certainly neither the Orange County Superior Court nor Appellants can be blamed because Appellees, after requesting a hearing, declared themselves to be *beyond* the jurisdiction of the State court and though "not meaning any disrespect" refused to argue the merits of the obscenity issue.

The District Court found that the "objective facts" described in the opinion:

> . . . clearly demonstrate bad faith and harassment which would justify federal intervention. Any edi-

torializing of those facts would serve no purpose. It is sufficient to note that the pattern of seizures of the plaintiffs' cash receipts and films demonstrate that the police were bent upon a course of action that, regardless of the nature of any judicial proceeding, would effectively exorcise the movie "Deep Throat" out of Buena Park.

Appellants submit that four seizures under valid search warrants during a two-day period and followed by an adversary hearing are not "harassment" and "bad faith" within the clear meaning of *Younger v. Harris, supra,* and *Perez v. Ledesma, supra.* See also *Com. of Pa. ex rel. Feiling v. Sincavage,* 439 F.2d 1133 (3d Cir. 1971); *Robbins v. Bryant,* 349 F.Supp. 94, affirmed 474 F.2d 1342; *Boyd v. Hoffman,* 342 F.Supp. 787; *Summers v. McNamara,* 239 F.Supp. 806; *Wilhem v. Turner,* 298 F.Supp. 1335, affirmed 431 F.2d 177, *cert. den.* 401 U.S. 947, 28 L.Ed.2d 230; *Fowler v. Alexander,* 340 F.Supp. 168, affirmed 478 F.2d 694; *Link v. Greyhound Corp.,* 288 F.Supp. 898; *Quinnette v. Garland,* 277 F.Supp. 999; *Haigh v. Snidow,* 231 F. Supp. 324; *Rhodes v. Huston,* 202 F.Supp. 624, affirmed 309 F.2d 959, *cert. den.* 383 U.S. 971, 16 L. Ed.2d 311.

The proposition that an official cannot be guilty of harassment when he legally performs his legal duty is obviously unquestionable, just as it is unquestionable that if the seizures were legal they cannot constitute harassment. Moreover, if a prosecutor honestly believes the law to be as he enforces it, and if his position is rational, he cannot be guilty of harassment.

The jurisdiction of the state court to hold prior adversary hearings under authority of Penal Code Sec-

tions 1526-1540 is not in question. Those statutes have always been interpreted as requiring the magistrate to make an immediate determination of the issue of obscenity at an adversary hearing. (*Cf. Zeitlin v. Arnebergh*, 59 Cal.2d 901; *Aday v. Superior Court*, 55 Cal.2d 789; *Aday v. Municipal Court*, 210 Cal.App. 2d 229; *People v. Superior Court (Loar)*, 28 Cal.App. 3d 600.) Under the requirements set forth by this Honorable Court, an adversary hearing and a prompt final judicial determination of the issue of obscenity must be had *before* a seizure of all available copies pending trial can be ordered.

Within the purview of the California search and seizure statutes in compliance with the mandated First Amendment requirements, California magistrates can, upon affidavits supporting probable cause, issue a search warrant for the seizure of *one* copy of a film (Penal Code §1525). Under authority of Penal Code Sections 1540 and 1536, the courts are under a duty to ascertain whether the material is in fact contraband (*i.e.*, obscene) and to order the same returned forthwith if they find it to be not obscene. They can thus order the parties to appear before the court to determine that issue. If after a hearing the court finds the material to be obscene, the prior judicial determination requirement is satisfied and a warrant can issue for the seizure of all copies.

The reviewability and concomitant finality of the court's determination is shown by such cases as *Aday v. Superior Court, supra*, which hold that a Petition for Writ of Prohibition and a Petition for Hearing can be taken from such determination.

Plaintiffs have contended (and the three-judge court has apparently so held in light of their August 3, 1974,

order to show cause *in re* contempt) that a *final judicial* determination of obscenity must be made at the trial and that only one copy can be seized prior to that time. The argument, Appellants contend, flies in the face of logic, common sense, *Aday v. Superior Court, supra,* and *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789. A defendant can avoid multiple seizures and prosecutions by *refraining* from showing a movie held to be obscene after an adversary proceeding until the jury trial has been had, a period of not more than 40 days under California law unless at defendant's request. To hold otherwise is to say that a *judicial* determination is a meaningless act which allows the defendant to keep on committing that which the courts have determined to be a crime and which is, therefore, presumptively a crime.

Moreover, the clear meaning of the cases requires a *judicial,* not a jury determination. *Heller, supra,* as well as all of its precursors, do not speak of a *jury* determination but a *judicial* determination of the issue of obscenity. In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), this Honorable Court expressly rejected the concept of a binding jury determination on the issue of obscenity. In that case the Court held that the *judges* have the *duty* to protect free expression by making an independent constitutional determination of obscenity of the materials before it and stated:

> Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

At note 3 of that same opinion, the United States Supreme Court concluded:

> It may be true . . . that judges 'possess no special expertise' qualifying them 'to supervise the private morals of the Nation' or to decide 'what movies are good or bad for local communities.' But they do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standard for obscenity. If freedom is to be preserved, *neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression.*

In compliance with the United States Supreme Court mandates, the California Supreme Court, in *Zeitlin v. Arnebergh,* 59 Cal.2d 901, 908-909, held that the *court* in each case *must* make an independent determination of the obscenity of the material and concluded:

> . . . we believe that this issue must be resolved by this court; it cannot properly be reposed in a jury for final disposition as a question of fact. The crux of our case is whether the definition of obscene matter in Penal Code section 311 sanctions prosecution of sellers of "Tropic of Cancer" and whether the constitutional guarantees of freedom of speech and freedom of the press (U.S. Const., 1st and 14th Amends.; Cal. Const., art. I, §9) permit such prosecution. As we shall point out in more detail, the courts have long recognized that such questions of statutory and constitutional construction and application call for court decisions; they raise issues, not of the ascer-

tainment of historical fact, but the definition of statutory proscription and constitutional protection; the court itself must determine the law of the case for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene.

The rationale of the California Court is best expressed in its statement that:

> The determination of what is obscene in the statutory or constitutional sense is not a question of fact (i.e., a question of what happened), but rather is a question of fact mixed with a determination of law; a "constitutional fact."

Aday v. Superior Court, 55 Cal.2d 789; *Aday v. Municipal Court*, 210 Cal.App.2d 229; and *People v. Superior Court*, 28 Cal.App.2d 600, show that a *judicial* determination of the issue of obscenity is to be had at a special hearing as soon as possible after seizure.

Allowing the jury to be the "definitive determinant" of the obscenity of the material is also contrary to presently articulated principles of law. As *Miller v. California, supra*, at note 9 recognizes:

> The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States, supra*, 354 U.S., at 492, n. 30 (1957), "[I]t is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States*, 165 U.S. 486, 499-500."

Zeitlin v. Arnebergh, 59 Cal.2d 901, 907, points to the inconclusiveness of a jury verdict and states:

> A finding of guilt of one purveyor of obscene publications will not necessarily discourage others; indeed such vendors characteristically operate undercover and are inclined to recidivism. If, on the other hand, a verdict expresses a determination that the material is not obscene the city attorney is still free to prosecute another bookseller for selling the same publication. If a criminal verdict, whether of guilt or of innocence, operates primarily within a particular county to ban the book in the case of guilt, or to encourage its sale in the case of innocence, an opposite result might readily obtain in another county. Such an approach must inevitably engender a hodgepodge pattern of suppression and sale.

That same principle was recognized in *Bernard v. Municipal Court*, 142 Cal.App.2d 324, where the court, after a jury acquittal, refused to return the materials because they were obscene.

United States v. West Coast News Co., 228 F.Supp. 171, affirmed 357 F.2d 855 (6th Cir. 1966), reversed on other grounds, 388 U.S. 447, 18 L.Ed.2d 1309 (1967) also supports Appellants' contention. In that case defendant had been priorly tried and acquitted of a similar charge. After noting that the book had not been presented to the jury in the prior case, the court concluded that *even* if the book had been pesented and *even* if the jury had acquitted him, neither double jeopardy nor *res judicata* were applicable because:

> . . . defendant Aday was not charged with the same offense in the District Court in California as that with which he is charged in this case. Besides

the fact that the book, *The Black Night,* was never submitted to the jury, the indictment in that case charged transportation of that book to different places on different dates than the indictment in this case. See 18 U.S.C. §3237(a).

If the book had been submitted to the jury, and if the jury had acquitted defendant Aday on the count naming the book, *The Black Night, it would still be impossible to know whether or not the jury based its acquittal upon the fact of non-obscenity. It is as reasonable to assume that they may have acquitted defendant Aday on grounds of lack of scienter, or non-transportation* (Emphasis added).

That same court also points out that *each* act of mailing is a separately prosecutable offense and that:

In fact, the statutes involved in this case contemplate that a defendant may be acquitted for sending a book to one place, and found guilty for sending the same book to another place. Footnote 30 to the majority's opinion in the *Roth* case, *supra,* stated:

"It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. *Cf. Dunlop v. United States,* 165 U.S. 486, 499-500 [17 S.Ct. 375, 379-380, 41 L.Ed. 799]."

In *State v. Ell-Gee, Inc.*, 255 So.2d 542, for example, the Florida Court of Appeals held against Defendants who had made the following contention:

> Essentially, appellees' reliance is upon its argument that the performance of a play, even though in violation of the several lewdness and obscenity statutes and ordinances, is a continuing performance throughout its run and therefore constitutes but a single episode or transaction within the meaning of *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970), and consequently the conviction in the Municipal Court of Miami Beach foreclosed any prosecution for an earlier performance of the same play, under the Double Jeopardy Clause, of the Fifth Amendment, or under the Doctrine of Collateral Estoppel.

The Court, in rejecting Defendants' double jeopardy claim and in reversing the finding of the Court below, concluded:

> Each performance of the play constituted a separate incident, transaction or episode even though the same words were spoken and the same exposure indulged in. We equate this activity with that of a bookmaker taking separate bets on separate days on any gambling activity, or a prostitute plying her activities day after day, or separate acts of incest committed with the same victim on separate days, or the uttering of a continuous series of forgeries on the same person's account in the same bank, or the shooting of a number of persons with the same gun during a single demonstration or uprising.
>
> Here, each performance of the play presumably was before a different audience, so that the lewd

and lascivious conduct or obscenity was portrayed at different times before different persons. The fact that the same words were used and the same lascivious conduct was indulged in does not convert the separate activities into a continuous transaction or continuing activity.

Steffel v. Thompson, Younger v. Harris, and *Perez v. Ledesma* make clear that harassment equals "prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction." Where, as in the case at hand, the procedures adopted have been found to be constitutional; where, as here, the law, though unsettled, argues in favor of the legality of Appellants' acts and in favor of the success of the prosecutions, several copies seized, each under a separate search warrant, cannot in and of themselves constitute harassment. Even before the July 25, 1974, *Miller v. California* decision by the Court, the allegation of harassment was improper and fictitious. After July 25, 1974, such an allegation (which must perforce imply a belief on the part of the prosecution that the California obscenity law is invalid) was wholly untenable. Absent proven harassment, the three-judge court abused its discretion in the exercise of jurisdiction and in granting any and all types of injunction or other relief.

X.

Interference With the State Criminal Proceedings Was Apparent and Unavoidable and Abstention Was Mandated.

The very principle upon which *Steffel, supra,* rest the propriety of issuance of a declaratory judgment in the instances therein contemplated, is the recognition that a declaratory judgment is "less abrasive" than an injunctive remedy and will have a "less intrusive effect

on the administration of state criminal laws." The magnitude of the "intrusion" and its "abrasiveness" in the case at hand is readily apparent.

The three-judge court in taking *and maintaining* jurisdiction over the action and in issuing an injunction against further seizures of other movies has provided the defendants in state criminal proceedings with a ready-made scheme to bypass and literally thumb their noses at the state courts. Evidence in the custody of the state court and which is the basis of the criminal proceedings is ordered returned. Although the defendants appear and answer to the state criminal charges they do so knowing that evidence of those charges will be gone at the time of trial. Although the defendants *demand* an adversary hearing prior to a seizure of additional copies, when the state court attempts to give them a hearing, they decline to appear, or if they do appear, they do so to tell the state court that they will not bother to argue the merits because the state court "lacks jurisdiction." (A. p. 72, R. p. 310).

The duplications and contradictions involved are further evidenced by the direct conflict between the orders issued by the state courts and the order of the Federal court. The Superior Court judge held an adversary hearing and found the movies to be obscene (A. p. 74). The seizures were held to be constitutional by a Federal judge (Judge Lydick) (A. p. 57, R. pp. 182-185). The Federal Plaintiff as defendant in the state criminal action moved to suppress as evidence and for the return of those same movies in the Orange County Municipal Court (A. p. 75). The Orange County Municipal Court held two of the seizures invalid. An appeal from that order of the Municipal Court was duly filed and the appeal was pending before the

state appellate court when the order of the three-judge court issued declaring the seizures to be "harassment" and ordering the movies returned. The Appellate Department of the Superior Court in due course issued an order in the criminal proceedings telling the municipal judge who holds the evidence and *who is subject to that order* that he cannot return the films because they are properly seized and are contraband (A. p. 131). The Orange County Superior Court orders an adversary hearing. Defendants walk out stating that the court lacks jurisdiction. After the hearing the Superior Court orders the seizure of all copies. The Federal court retaliates by threatening to hold the District Attorney and the Chief of Police in contempt and by countermanding the order of the Orange County Superior Court. Disruption of state proceedings!?!

In passim, it should be noted that the *one* truly important legal issue for determination in the state cases is whether after an adversary hearing a state court can order the seizure of additional copies of the film. A secondary but just as important legal question relates to the interpretation of California Penal Code Sections 1524-1540 as they relate to the holding of adversary hearings. Had the three-judge court refused to interfere, the Federal Plaintiffs would have litigated those issues where the issues belonged—in the state court proceedings. Instead they decided to ignore the fact that the order of seizure after adversary hearing is a *search warrant* and that the taking of evidence by the issuing magistrate is specifically provided for in California Penal Code Section 1526. They have conveniently blinded themselves to the fact that *each search warrant* is severely limited in scope and duration by those sections of the Penal Code and have op-

tioned (understandably on their part) to argue "harassment" before a three-judge court which ends up as a court with apparent appellate jurisdiction over the Appellate Courts of the State of California.

By allowing the Petitioners to argue the matter in the Federal Courts after their refusal to submit to the jurisdiction of the State Courts and to pursue their appellate remedy as to the jurisdictional issue prior to intervening, the Federal Court *presumed* and *assumed* inability on the part of all levels of State Courts to do justice. Since Petitioners' original argument centered on the validity of State Statutes regulating searches and seizures, the action of the Federal Court had the further effect of obstructing the proper administration of justice by precluding an authoritative determination of the issue—a key issue in this case—by the California Appellate Court. Nor is federal intervention excused by need for speed since the California Appellate Court, Fourth Appellate District, has been consistent in its granting of *immediate* stays pending consideration of the merits of any issue of First Amendment importance. (Had the Federal Court taken evidence in this case, the testimony of the Court Clerk would have shown this to be true.) Appellants respectfully submit that the old and well-established concepts of comity strongly argue gross abuse of discretion on the part of the Federal Court in deciding to intervene under the circumstances of this case, an abuse that can only tend to encourage future similar actions and thus can only tend to encourage disrespect for the authority of a sister court —and for all courts—and lead to the very abuses decried by *Steffanelli v. Minard,* 342 U.S. 117, 123-124 (1951), and *Veen v. Davis,* 326 F.Supp. 116, 117 (C.D. Cal. 1971).

XI.

The Record Shows Lack of Jurisdiction in That the Complaint Seeks Recovery of Property in the Custody of a State Court of Prior Jurisdiction and Federal Intervention Is Prohibited in Such Cases.

In *Donovan v. Dallas*, 377 U.S. 408, 411, 12 L.Ed. 2d 409, 413 (1964), the Supreme Court points out that when the aim of the proceedings is property in the custody of a state court the proceedings are *in rem* or *quasi rem* proceedings. In such cases, the jurisdiction with the Court having custody is *exclusive:*

> Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule had continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. *Princess Lida v. Thompson*, 305 U.S. 456, 456-468, 83 L.Ed. 285, 290-292, 59 S.Ct. 275.

Moreover, even where the state court and the federal court have concurrent jurisdiction, the first court issuing its decision does not and *cannot* enforce the judgment it renders by contempt or injunction. Rather, the opinion states the proper method of procedure to be as follows:

> In *Princess Lida* this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of

them which may be set up as res judicata in the other." *Id.*, at 466, 83 L.Ed. at 291. See also *Kline v. Burke Construction Co.*, 260 U.S. 226, 67 L.Ed. 226, 43 S.Ct. 79, 24 A.L.R. 1077.

To the same effect are *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 86 L.Ed. 100 (1941); *Purcell v. Summers*, 126 F.2d 390 (4th Cir. 1941), *cert. den.* 317 U.S. 640, 87 L.Ed. 516. See also *Phillips v. City of Atlanta*, 57 F.Supp. 588; *Downing v. Davis*, 34 F.Supp. 872; *White v. Crow*, 17 Fed. 98, affirmed 110 U.S. 183, 28 L.Ed. 113 (1884).

In the case at hand, since all of the property to which the June 4 order to return and the September 30, 1974 order to petition are directed as well as the property sought to be returned *is* in the custody of the state court and is evidence in criminal proceedings, both of the Federal court orders are jurisdictionally defective.

XII.

California Penal Code Section 311.2 as Construed by Enskat, Supra, and by Prior California Decisions Is Constitutionally Valid Under the Test Set Forth in Miller v. California.

This Honorable Court in *Miller v. California* set forth the following guidelines to be used in determining the validity of a State Statute:

(a) Whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest. *Kois v. Wisconsin, supra*, 408 U.S. at 230 (1972), quoting *Roth v. United States, supra*, 354 U.S. at 489 (1957), (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the

applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The first prong or part (a) of the test is identical to the requirement set forth in the California statute. The third prong or part (c) of the test is obviously satisfied by the "utterly without redeeming social importance" California test which *Miller* recognized to be more "burdensome" on the prosecution than the test adopted in *Miller*. These two prongs of the three-pronged *Miller* definition cannot, therefore, be said to be either "vague" or unconstitutional and require no discussion.

The sole question for determination, therefore, is whether the California Statutes as construed satisfy part (b) of the *Miller* test. The *Miller* opinion gives the following examples of what constitutes a valid definition:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

The definition, however, is the constitutional limitation set on the states, but as with all constitutional limitations, a state statute *need not* prohibit all that the Constitution allows. And, as pointed out by the opinion, a state statute will not be declared unconstitutionally vague, if it has been "constitutionally" construed. As further stated in the opinion:

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure

of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed (Emphasis added).

Interestingly, the word "hard core" appears over and over in the opinion. For example, Justice Burger concludes part two of the opinion by stating:

But today, for the first time since Roth was decided in 1957, a majority of this court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment (Emphasis added).

This same statement is reiterated in part IV where the Justice concludes:

. . . it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine (Emphasis added).

In passim, it should of course be noted that the opinion finds the *Miller* trial to have been constitutionally conducted, the material in *Miller* to have been constitutionally unprotected because obscene, and the conviction to be free from constitutional infirmity.

An analysis of some of the California Appellate cases from 1963 to date shows that the California statute has, at least in the last ten years, been interpreted to prohibit the possession for sale and distribution of "hard core" pornography which is defined by those same cases as *patently offensive depiction or description of ultimate sexual acts such as intercourse, bestiality, sodomy and oral copula-*

tion, etc. (Since these are the only acts involved in California prosecutions under the present statute, a more exact definition is not necessary. For those who might be in doubt as to the meaning of the word "ultimate", it seems rather obvious that the word implies and describes those acts which lead to a culmination, that is to orgasm.)

In 1963 Justice Tobriner, in *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 912 recognized that:

> The Legislature patterned its definition of obscenity upon that set forth in the American Law Institute's Model Penal Code (Sec. 207.10), portions of which had been approved as constitutionally permissible standards by the United States Supreme Court in *Roth v. United States* (1957), *supra*, 354 U.S. 476. This decision and others of the United States Supreme Court, we think, impliedly drew a line of constitutional protection around all material except that which had been described as *hard core* pornography (Emphasis added).

That same opinion goes on to say:

> Mr. Justice Brennan, *writing the majority opinion*, held that "obscenity is not within the area of constitutionally protected speech or press" (p. 485) because, in the words that were later incorporated in the California statute, obscenity is "utterly without redeeming social importance." (p. 484) *He points out that "sex and obscenity are not synonymous . . .* [and the] *portrayal of sex, e.g. in art, literature and scientific works . . .* [is entitled to] *the constitutional protection of freedom of speech and press*" provided that it

> does not become the *designated* kind of obscenity (Emphasis added).

At page 914 of that same opinion, the Court concluded:

> I do not think that the federal statute can be constitutionally construed to reach other than what the government has termed as "*hard core*" pornography (Emphasis added).

At pages 194-195, the opinion describes several incidents and sexual acts it considered not to be "obscene" or "hard core" pornography. Thereafter the Justice defines what *is* hard core pornography (*id.* at pp. 919-920) in terms which can only be said to anticipate today's *Miller* test.

In 1967, the California Supreme Court again reaffirmed its definition of "hard core" pornography in *People v. Noroff,* 67 Cal.2d 791, 794. There the Court found the material not to be obscene *because:*

> Most of the pictures, however, depict entirely innocuous outdoor activities at a nudist colony or sunbathing camp; none of the photographs displays any form of *sexual activity* (Emphasis added).

At note 26, the footnote which follows the above statement, the Court concludes by specifically *defining* what depictions and descriptions constitute "hard core" pornography:

> *The graphic depiction of such sexual activity is the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene.* The publications involved in *Ginzburg v. United States, supra,* 383 U.S. 463, contained descriptions and photographic essays deal-

ing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of "*animating* sensual detail to give the publication a salacious case . . ." (Emphasis added). (*Id.*, at p. 471 [16 L.Ed.2d at p. 38]).

Similarly, in 1968 the Court in *In re Panchot*, 70 Cal.2d 105, 107 stated:

> *Graphic depiction of sexual activity is the distinguishing feature of the only materials which the United States Supreme Court has ruled to be obscene* (Emphasis added).

In *People v. Cimber*, 271 Cal.App.2d Supp. 867, 869 the court reiterated:

> To constitute obscenity under the rules established by the United States Supreme Court and the even *more stringent requirements* of our State Supreme Court the material must contain a graphic description of sexual activity. (*In re Panchot* (1968) 70 Cal.2d 105 [73 Cal.Rptr. 689, 448 P.2d 385].) There the pictures contained depictions of masochism, masturbation and simulated sexual intercourse. As these are fields which fall under the highest courts' definition of hard core pornography . . .

In 1971, the court in *People v. Golden*, 20 Cal.App. 3d 211, 214 describes a warrant for the seizure of motion picture films:

> Based on these facts, Sergeant Shaidell stated in his affidavit for warrant that he had reasonable and probable cause to believe that in defendant's automobile and at his home there were ". . . *motion picture films depicting acts of sexual intercourse, masturbation, sodomy, bestiality and*

> *oral copulation; booklets, commonly known to your affiant as 'Tijuana Bibles, which depict in writing and photograph and drawing acts of sexual intercourse, sodomy, masturbation, bestiality and oral copulation.'* " (Emphasis added).

In *People v. Stout*, decided in 1971, 8 Cal.App.3d 172, 174, both defendant and prosecution stipulated that the material *was* obscene. The Court, in upholding the stipulation, stated:

> Appellant stipulated in the trial court that the film exhibited by him is "obscene according to the latest expression of the California Supreme Court and the United States Supreme Court." The stipulation is amply supported by the record which shows that the film in question *constituted hard core pornography* (Emphasis added).

The same rationale is followed in *People v. Burnstad*, 32 Cal.App.3d 560, 562. In that case the court in upholding the search warrant did so because:

> Here the *defendant had himself placed the mark of contraband on the films.* In all his dealings with Officer Dixon, defendant had pandered all of his films as "hardcore" pornography (Emphasis added).

The above cases show that (a) California statutes have been interpreted by the California courts to limit prosecution to "hardcore" pornography. (b) "hardcore pornography" is and has been defined by the cases as an explicit and graphic depiction of "ultimate" sexual activity either heterosexual or homosexual, that is, depictions and descriptions of acts of sexual intercourse, masturbation, sodomy, bestiality, sadism, masochism and oral copulation deliberately designed to stimulate sexual feelings (that is, "appeal to the pru-

rient interest.") (c) the meaning of hard core pornography is well known and much used by the defendants themselves in describing the material and is merely a one-word definition for the behavior described in *Miller*, (d) hard core was prosecutable before *Miller* and is certainly prosecutable now.

The last California Appellate Court decision on the issue, *People v. Enskat*, 33 Cal.App.3d 900 reaffirms the definition of obscenity given in the above cases and constitutes a *post-Miller* authoritative interpretation of the obscenity statutes.

Appellants respectfully submit that the above cases argue very strongly in favor of the propriety of the Appellate Court interpretation of the California statute and of its finding that the California obscenity statutes are constitutional.

In light of the construction given to the California Statutes by the California cases, Appellants submit that the California Statute is unquestionably sufficiently clear to withstand constitutional attack. As this Honorable Court has reiterated at note 11 of the *Miller* decision:

> Many decisions have recognized that these terms of obscenity statutes are not precise. (Footnote omitted.) This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. . . . (T)he Constitution does not require impossible standards; all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ." *United States v. Petrillo*, 332 U.S. 1, 7-8.

Finally, this Honorable Court in *Hamling v. United States,* .... U.S. .... made clear that a construction similar to the construction in *Enskat* is constitutionally proper.

In light of all of the above authorities, the finding of unconstitutionality made by the three-judge court must be reversed.

Conclusion.

For the reasons above stated, it is respectfully submitted that the judgment of the court below should be reversed and the complaint should be ordered dismissed for lack of jurisdiction.

Dated this 31st day of December, 1974.

Respectfully submitted,

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